STATE OF MICHIGAN

COURT OF APPEALS

LORRI ANN LAIR,

Plaintiff-Appellant,

v

ORTHO BIOTECH, a/k/a JOHNSON & JOHNSON,

Defendant-Appellee.

UNPUBLISHED
February 21, 2006

No. 263405
Wayne Circuit Court
LC No. 04-437888-CL

Before: Murray, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiff appeals by right an order granting summary disposition pursuant to MCR 2.116(C)(8) in favor of defendant. We affirm.

We review de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(8). *Henry v Dow Chemical Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). MCR 2.116(C)(8) allows for summary disposition when "[t]he opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8); *Henry*, *supra*. A motion under subrule (C)(8) tests the legal sufficiency of the complaint based on the pleadings alone. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). A court should look to the pleadings and accept all well-pleaded facts as true. *Henry*, *supra*. "The motion should be granted if no factual development could possibly justify recovery." *Corley*, *supra*, quoting *Beaudrie v Henderson*, 465 Mich 124, 130; 631 Mich 308 (2001).

Plaintiff claims, initially, that the trial court improperly granted summary disposition because the court looked beyond the pleadings to determine that plaintiff had not stated a viable claim. We disagree. Rather, the trial court properly concluded that the complaint did not allege a violation of public policy necessary to support an actionable claim.

We consider, first, the elements that are necessary to allege discharge in violation of public policy. As background to this discussion, we note that, generally, either party to an employment contract for an indefinite term may terminate the contract at any time for any reason, or for no reason, unless the contract provides a reason for holding otherwise. *Suchodolski v Michigan Consol Gas Co*, 412 Mich 692, 695; 316 NW2d 710 (1982), citing, generally, *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980). However, in *Suchodolski*, our Supreme Court recognized three exceptions to this general

rule that apply when "the discharge is so contrary to public policy as to be actionable though the employment is at will." *Edelberg v Leco Corp*, 236 Mich App 177, 180; 599 NW2d 785 (1999), referring to *Suchodolski, supra* at 692. The exceptions apply when:

> (1) the employee is discharged in violation of an explicit legislative statement prohibiting discharge of employees who act in accordance with a statutory right or duty,[1] (2) the employee is discharged for the failure or refusal to violate the law in the course of employment, [or] (3) the employee is discharged for exercising a right conferred by a well-established legislative enactment. [*Edelberg*, *supra*; see, also, *Suchodolski*, *supra* at 695-696.]

Here, plaintiff invokes both the second and third exceptions. With regard to the first exception, "[t]he term 'law' may include those principles promulgated in constitutional provisions, common law, and regulations as well as statutes." *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 485; 516 NW2d 102 (1994), citing Black's Law Dictionary, Unabridged Fifth Edition (1979). Moreover, with regard to both exceptions, this Court has specifically established that a violation of public policy may be premised on the alleged violation of a federal statute. *Garavaglia v Centra, Inc*, 211 Mich App 625, 631; 536 NW2d 805 (1995).

Finally, the primary function of a pleading is to "give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993); see, also, MCR 2.111(B)(1). Moreover, "a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 592; 683 NW2d 233 (2004).

Here, plaintiff alleged that she was retaliated against, discriminated against or discharged from her job because she refused to violate federal Food and Drug Administration (FDA) regulations in the course of her employment as a salesperson for the defendant drug manufacturer. Specifically, she alleged that defendant required her to promote the drug Doxil to doctors for the treatment of breast cancer. She further alleged that Doxil had not been approved by the FDA for this use. Accordingly, she alleged that she was retaliated against for her refusal

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[1] Although it is largely inapplicable to this appeal, there is some question whether the *Suchodolski* Court's first category of exception was later eliminated by our Supreme Court's decision in *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993). There, the Supreme Court established that an employee may not claim a public policy violation if there is an existent statutory prohibition against discharge in retaliation for the conduct at issue; in such cases, the statute itself provides relief and, therefore, precludes a public policy claim. *Id*. at 79-80. Accordingly, this Court opined that *Dudewicz*, *supra*, "probably eliminated" the first *Suchodolski* exception. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 485; 516 NW2d 102 (1994). Nonetheless, in *Edelberg*, *supra* at 180 n 2, this Court listed each of the three categories as viable exceptions and merely footnoted the holding in *Dudewicz*, *supra*. See, also, *Garavaglia v Centra, Inc*, 211 Mich App 625, 630; 536 NW2d 805 (1995) (opining that the *Dudewicz* Court limited the first exception "[t]o some extent").

to violate federal "requirements" because "Federal FDA requirements prohibit the sale or promotion of a drug for a non-approved use." However, the trial court properly concluded that the quoted allegation is not a correct statement of law and, therefore, that the complaint did not sufficiently allege that plaintiff refused to violate – or attempted to exercise a right conferred by – a law or enactment.

We find no error in the trial court's reference to *Washington Legal Foundation v Henney*, 202 F3d 331; 340 US App DC 108 (2000), to determine whether FDA requirements, in fact, prohibit the sale or promotion of a drug of a non-approved (or "off-label") use. Because plaintiff was required to describe a law or enactment which formed the basis of her public policy claim, the trial court properly questioned whether she had alleged a valid law or enactment. The *Washington Legal Foundation* court examined the Food, Drug and Cosmetics Act (FDCA), 21 USC 301 *et seq*., in the wake of the FDA Modernization Act of 1997 ("the 1997 act"), 21 USC 360aaa *et seq*. *Id*. at 334. The case explicitly involved a claim that certain previous FDA agency enforcement policies violated federal First Amendment free speech rights. *Id*. at 333. Plaintiff, therefore, correctly points out that the claims involved, which arose before the 1997 act superceded the challenged policies, were eventually dismissed as moot. *Id*. at 334, 337. However, plaintiff does not challenge that the court's construction of the FDCA remains as useful authority. In fact, we note that the court's relevant conclusions are echoed by other cases that construe the FDCA and that cite *Washington Legal Foundation*. See, e.g., *Franklin v Parke-Davis*, 147 F Supp 2d 39, 44 (D Mass, 2001).

Moreover, the trial court did not misconstrue the *Washington Legal Foundation* court's conclusions regarding the FDCA. The *Washington Legal Foundation* court opined that the FDCA "specifically authorizes a manufacturer to disseminate 'written information concerning the safety, effectiveness, or benefit of a use not described in the approved labeling of a drug or device,' 21 U.S.C. § 360aaa(a), if it complies with several requirements." *Washington Legal Foundation*, *supra* at 334. Significantly, the court also noted that the 1997 act amended the FDCA by defining prohibited activity as "[t]he dissemination of information *in violation*" of the act's provisions. *Id*., quoting 21 USC 331(z) (emphasis provided by the *Washington Legal Foundation* court).

Accordingly, because plaintiff merely alleged that, "[f]ederal FDA requirements prohibit the sale or promotion of a drug for a non-approved use," the trial court properly concluded that her complaint did not state a viable claim. She did not allege that defendant had not met the requirements for such promotion. Therefore, the complaint does not sufficiently identify a law or contain the necessary factual allegations to support plaintiff's conclusion that defendant required her to engage in unlawful promotional activities. *Lawsuit Financial*, *supra*. We therefore conclude that the trial court properly granted summary disposition based on plaintiff's failure to state a claim for which relief may be granted. MCR 2.116(C)(8).

Plaintiff, nonetheless, argues on appeal that the trial court's conclusion missed the point of her complaint, which did not intend to allege that *all* off-label promotion is illegal, but which alleged that the tasks that she was instructed to engage in were specifically illegal. As discussed above, however, plaintiff did not allege any specific tasks which violate the FDCA. We therefore address what appear to be plaintiff's intended allegations in the context of her argument that the trial court should have permitted her to amend her complaint.

We review a trial court's decision regarding amendment of a complaint for an abuse of discretion. *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 138; 676 NW2d 633 (2003). Given the nature of discretionary decisions, an abuse of discretion constitutes more than merely a difference in judicial opinion. *Dep't of Transportation v Randolph*, 461 Mich 757, 767-768; 610 NW2d 893 (2000). A trial court must have a reasoned basis for its decision. *Id*. at 768. However, an abuse of discretion exists only "when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000); see, also, *Randolph*, *supra* at 768.

If the grounds asserted for summary disposition are based on MCR 2.116(C)(8), (9) or (10), "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5); *Liggett*, *supra*. "The term 'shall' denotes a mandatory rather than a discretionary course of action." *Liggett*, *supra*. "Thus, amendment is generally a matter of right, rather than grace." *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). Accordingly, "[w]hen a trial court grants summary disposition pursuant to MCR 2.116(C)(8), or (C)(10), the opportunity for the nonprevailing party to amend its pleadings pursuant to MCR 2.118 should be freely granted." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004); see, also, MCR 2.118(A)(2) (leave to amend "shall be freely given when justice so requires").

Amendment is not justified, however, under several circumstances including when amendment would be futile. *Franchino v Franchino*, 263 Mich App 172, 189-190; 687 NW2d 620 (2004). "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Lane*, *supra*. Finally, when denying a request to amend the complaint, a trial court should support its decision by stating specific findings explaining its reasons for the denial. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656-657; 213 NW2d 134 (1973); *Franchino*, *supra* at 190.

Here, after the court granted defendant's motion for summary disposition, plaintiff asked to amend the complaint "just so the record is clear." She asked the court, apparently based on the preceding discussion: "Are you arguing it would be futile to amend the complaint?" The court said "yes," and denied her request for amendment based on futility and without further explanation. Plaintiff made no effort to describe her proposed amendments. Moreover, throughout the preceding discussion, she did not cite the statutory provisions or additional arguments that she now raises on appeal. During the discussion, the court gave plaintiff the opportunity to explain her claim that defendant had violated the FDCA given the court's conclusion that off-label promotion is not illegal per se. Despite that plaintiff stated that there "must be 50 or 60 pages of regulations . . . on what you can and can't do," she persisted in concluding: "She as the salesperson cannot go in there and sell it for something it was not approved for. . . . [S]he cannot go in there and suggest it can be used for anything other than what is originally approved by the FDA. And that's where the regulation violation came in." Her argument merely mirrored the insufficient allegation in the complaint. Finally, despite that plaintiff moved for reconsideration of the court's decision to grant summary disposition based on the original complaint, she did not in the context of her motion for reconsideration request leave to amend the complaint nor did she submit a proposed amended complaint.

Accordingly, plaintiff did not provide the court with a basis to conclude that amendment would be anything but futile. Furthermore, the court's reasons for ruling that plaintiff's allegations could not support a viable amended complaint were fairly clear from the discussion at the motion hearing. Therefore, we conclude that the court did not abuse its discretion when it denied plaintiff's motion to amend the complaint.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Henry William Saad